Public Prosecutor v Lee Poh Chye & Anor

HIGH COURT (PENANG) — CRIMINAL APPEAL NO 41-245-94
JEFFREY TAN JC
29 SEPTEMBER 1995

Criminal Law *— Penal Code (Malaysia) — s 96 — Private defence — Nature of — Whether retaliation was in excess of what was necessary to constitute private defence*

Evidence *— Burden of proof — Accused's burden — Private defence — Quantum of proof — Evidence Act 1950 ss 101 & 105*

This was an appeal against the decision of the sessions court acquitting both the respondents in the trial of a charge of culpable homicide not amounting to murder, punishable under the first limb of s 304 of the Penal Code (FMS Cap 45) ('the Code'). The respondents relied on the right of private defence. Witnesses for the prosecution gave evidence that the respondents had attacked the deceased, hitting him several times on the head. According to the witnesses, the deceased had defended himself. However, the respondents continued to attack him even when the deceased was retreating to the staircase and they stopped only when the deceased fell down the stairs. The respondents' version was that the deceased had attacked the first respondent with a kitchen knife and that the respondents defended themselves. The evidence showed that there were injuries on the deceased's head, face, shoulders, arms and legs.

Held, allowing the appeal:

(1) An accused who claimed the benefit of an exception in the Code had the onus of proving, on a balance of probabilities, the circumstances bringing the case within the exceptions, based on s 105 of the Evidence Act 1950. However, s 105 must not be read in isolation but in relation to the Evidence Act 1950 as a whole and in particular ss 101 and 102 which required the prosecution to prove the guilt of an accused person (see pp 582B–583E); *Ikau anak Mail v PP* [1973] 2 MLJ 153; *Jayasena v R* [1970] 1 All ER 219, *Looi Wooi Saik v PP* [1962] MLJ 337, *PP v Yuvaraj* [1969] 2 MLJ 89, *Nagappan all Kuppusamy v PP* [1988] 2 MLJ 53 dan *Tenaga Pharmed Sdn Bhd v PP and other applications* [1994] 2 MLJ 23 followed.

(2) The right of self-defence depended upon the particular facts and circumstances of the case. The retaliation could not exceed what was reasonably necessary to avert an assailant's threat (see pp 593H–595A); *Lee Thian Beng v PP* [1972] 1 MLJ 248 and *PP v Abdul Manap* [1956] MLJ 214 followed.

(3) In this case, the deceased's injuries testified that the respondents bludgeoned the deceased's head with unrelenting blows even after the deceased could offer no resistance. The injuries were such that even if there was retaliation, it was excessive as more

harm than necessary was inflicted for the purpose of self-preservation, when the contest, if any, was long over and there was no longer any danger or reasonable apprehension of danger (see p 594A); *Lee Thian Beng v PP* [1972] 1 MLJ 248 and *Musa bin Yusof v PP* [1953] MLJ 70 followed.

(4) Based on the facts of the case, there was ample direct evidence that both respondents had assaulted the deceased. There was active participation by both respondents in the same criminal act that brought about the deceased's death. The direct evidence against each respondent was overwhelming and there was no need whatsoever to rely on s 34 of the Code (see p 600F).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan mahkamah sesyen membebaskan kedua-dua penentang dalam perbicaraan untuk kesalahan homisid salah yang tidak berjumlah kepada membunuh, yang boleh dihukum di bawah bahagian pertama s 304 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut'). Penentang-penentang telah bergantung kepada hak pembelaan persendirian. Saksi-saksi untuk pihak pendakwa telah memberi keterangan bahawa penentang-penentang telah menyerang si mati, memukulnya beberapa kali atas kepala. Menurut saksi-saksi tersebut, si mati telah cuba mempertahankan dirinya. Walau bagaimanapun, penentang-penentang telah terus menyerangnya walaupun si mati telah berundur ke tangga dan mereka hanya berhenti apabila si mati terjatuh dari atas tangga. Penentang-penentang pula telah menyatakan bahawa si mati telah menyerang penentang pertama dengan pisau dapur dan bahawa penentang-penentang telah mempertahankan diri mereka. Keterangan menunjukkan bahawa terdapat kecederaan pada bahagian kepala, muka, bahu, tangan dan kaki si mati.

Diputuskan, membenarkan rayuan:

(1) Seseorang tertuduh yang menuntut kekecualian dalam Kanun tersebut mempunyai beban membukti, atas imbangan kebarangkalian, keadaan-keadaan yang membawa kesnya dalam lingkungan kekecualian itu, berdasarkan s 105 Akta Keterangan 1950. Walau bagaimanapun s 105 tidak patut dibaca dengan sendirinya, tetapi harus dibaca bersama dengan Akta Keterangan 1950 pada keseluruhannya, terutamanya ss 101 dan 102 yang menghendaki pihak pendakwa membuktikan kesalahan seseorang tertuduh (lihat ms 582B–583E); *Ikau anak Mail v PP* [1973] 2 MLJ 153; *Jayasena v R* [1970] 1 All ER 219, *Looi Wooi Saik v PP* [1962] MLJ 337, *PP v Yuvaraj* [1969] 2 MLJ 89, *Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53 dan *Tenaga Pharmed Sdn Bhd v PP and other applications* [1994] 2 MLJ 23 diikut.

(2) Hak pertahanan diri bergantung kepada fakta-fakta dan keadaan tertentu kes. Tindakan balas tidak boleh melebihi apa yang diperlukan secara munasabah untuk mengelakkan ugutan penyerang (lihat ms 593H–595A); *Lee Thian Beng v PP*

[1972] 1 MLJ 248 dan *PP v Abdul Manap* [1956] MLJ 214 diikut.

(3) Di dalam kes ini, kecederaan si mati membuktikan bahawa penentang telah memukul kepala si mati dengan teruk meskipun selepas si mati telah tidak memberi tentangan. Kecederaan-kecederaan tersebut adalah sebegitu sehinggakan biarpun terdapat serangan balas, ianya adalah melampau kerana kemudaratan yang lebih daripada yang diperlukan telah dikenakan untuk tujuan pertahanan sendiri, apabila pertentangan tersebut, jikapun ada, telah lama tamat dan tidak lagi terdapat bahaya ataupun kemungkinan munasabah akan bahaya tersebut (lihat ms 594A); *Lee Thian Beng v PP* [1972] 1 MLJ 248 dan *Musa bin Yusof v PP* [1953] MLJ 70 diikut.

(4) Berdasarkan fakta-fakta kes, terdapat keterangan terus yang lebih daripada mencukupi yang menunjukkan bahawa kedua-dua penentang telah menyerang si mati. Terdapat penglibatan aktif oleh kedua-dua penentang di dalam tindakan jenayah yang sama yang mengakibatkan kematian si mati. Keterangan terus terhadap setiap penentang begitu ketara dan tidak ada keperluan langsung untuk bergantung kepada s 34 Kanun tersebut (lihat ms 600F).]

Notes

For cases on the right of private defence, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 782–786.

For cases on accused's burden where a defence is alleged, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 185–187.

Cases referred to

Akin Khan bin Abdul Rahman v PP [1987] 2 MLJ 217 (refd)
Chia Chee Yeen v PP [1991] 3 MLJ 397 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Harbans Singh Sidhu v PP [1973] 1 MLJ 41 (refd)
Ikau anak Mail v PP [1973] 2 MLJ 153 (follld)
Jayasena v R [1970] 1 All ER 219 (follld)
Lee Thian Beng v PP [1972] 1 MLJ 248 (follld)
Lin Lian Chen v PP [1992] 2 MLJ 561 (refd)
Loo Hwee Hong v PP [1978] 2 MLJ 164 (refd)
Looi Wooi Saik v PP [1962] MLJ 337 (follld)
Mahbub Shah v King Emperor (1945) LR 72 IA 148 (refd)
Mohamed Yusof bin Hj Ahmad v PP [1983] 2 MLJ 167 (refd)
Musa bin Yusof v PP [1953] MLJ 70 (follld)
N Govindasamy v PP [1976] 2 MLJ 49 (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53 (follld)
Othman bin Ahmad v PP [1970] 2 MLJ 176 (refd)
PP v Abdul Manap [1956] MLJ 214 (follld)
PP v Lim Eng Kiat [1995] 1 MLJ 625 (refd)
PP v Selvraj Subramanian [1985] 2 MLJ 190 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (follld)
Tenaga Pharmed Sdn Bhd v PP and other applications [1994] 2 MLJ 23 (follld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 173
Evidence Act 1950 s 105
Penal Code (FMS Cap 45) ss 96, 304
Evidence Act s 105 [Sri Lanka]
Evidence Act (Cap 5, 1970 Ed) s 105 [Sing]

Ishak bin Mohd Yusoff (Deputy Public Prosecutor) for the Public Prosecutor.

Mohd Ismail bin Mohd (Ismail, Khoo & Associates) for the respondents.

Cur Adv Vult

Jeffrey Tan JC: This is the learned Public Prosecutor's appeal against the decision of the Penang Sessions Court, acquitting both the respondents, in the trial of an offence punishable under the first limb of s 304 of the Penal Code (FMS Cap 45) ('the Code'). The charge against the respondents reads as follows:

> Bahawa kamu bersama-sama pada 27 Mac 1994, jam lebih kurang 7.30 malam di rumah No 22 Gat Lebuh Prangin dalam Daerah Timur Laut dalam Negeri Pulau Pinang, telah melakukan homisid salah tidak berjumlah kepada membunuh (culpable homicide not amounting to murder) dengan menyebabkan kematian Lee Kean Kee No K/P 6193682 dan dengan demikian telah melakukan kesalahan yang boleh dihukum di bawah bahagian pertama s 304 Kanun Keseksaan (NMB Bab 45) dan dibaca bersama s 34 Kanun yang sama.

There were two key decisions of the court below — calling the respondents to enter their defence at the close of the prosecution's case and then acquitting them at the close of the defence's case — that must be tested in the instant appeal.

The trial court's reasoning, for calling the defence is encapsulated in the grounds of judgment in the following paragraph:

> Oleh kerana 'line of defence' tidak mempertikaikan fakta pergaduhan di antara si mati dan OKT-OKT dan OKT-OKT cuba membawa pembelaan mempertahankan diri, mahkamah mengikut s 96 Kanun Keseksaan (NMB Bab 45) dan s 105 Akta Keterangan 1950, telah memanggil kedua-dua OKT membela diri dan memberi versi dan penjelasan mereka.

Section 96 of the Code provides that 'nothing is an offence which is done in the exercise of the right of private defence'. However, the burden of proof that an act was in the exercise of a right of private defence and therefore not an offence is upon an accused, as s 105 of the Evidence Act 1950 ('the Act') provides:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

As for the standard of proof of the existence of circumstances bringing the case within any of the general exceptions in the Code, or within any special exceptions or proviso, courts in Singapore evidently require proof of an exception on a balance of probabilities: (i) in *N Govindasamy v PP* [1976] 2 MLJ 49, the Singapore Court of Appeal held that exception 1 (grave and sudden provocation) of s 300 of the Singapore Penal Code is to be proved on a balance of probabilities; (ii) in *Harbans Singh Sidhu v PP* [1973] 1 MLJ 41, it was held that under s 105 of the Evidence Act (Cap 5, 1970 Ed) an accused who claims the benefit of exceptions has the burden of proving his plea that the case falls under any one of the exceptions, and that the burden is discharged if the accused succeeds on a preponderance of probability; while (iii) in *Chia Chee Yeen v PP* [1991] 3 MLJ 397, on the defence that the appellant at the material time was suffering from an 'abnormality of mind', the Court of Appeal held that the burden of proving diminished responsibility is on a balance of probabilities.

The position in Brunei is no different. In *PP v Lim Eng Kiat* [1995] 1 MLJ 625, it was held that the burden of establishing the exception of provocation is upon the accused who must establish the exception on a balance of probabilities; according to Roberts CJ (at p 633), the Malaysian authorities (*Othman bin Ahmad v PP* [1970] 2 MLJ 176 and *Ikau anak Mail v PP* [1973] 2 MLJ 153) which the Brunei High Court is content to follow is to the effect that the standard of establishing the exception of provocation is on a balance of probabilities.

A survey of the Malaysian authorities suggests, however, that the Malaysian point of view, so far as the superior courts are concerned, is not as explicit as Roberts CJ has made it out to be.

In *Othman bin Ahmad v PP* — an appeal against a conviction of murder — it was argued by the appellant that the trial court had misdirected the jury by directing that 'the burden of proving or satisfying you that the accused person only struck in self-defence is not as heavy as the prosecution burden of proving overall that the accused committed the offence of murder'. The Federal Court adopted the following enunciation by Thomson CJ in *Looi Wooi Saik v PP* [1962] MLJ 337 at p 340 on the standard of proof of the exception of self-defence:

> In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury is left with a sense of reasonable doubt as to the existence or non-existence of the provocation.

In *Ikau anak Mail v PP* — also an appeal against a conviction of murder — there was a clarification on the standard of proof of an exception in the following excerpt of the judgment (at pp 153–154):

> The learned judge did at one stage of his summing-up point out that there was a burden on the accused to prove on a balance of probability that he was deprived of the power of self-control by reason of provocation, but in another part of his summing-up he said that if the court were left with a

> reasonable doubt as to whether there was provocation or not then they have to accept that the defence had succeeded in bringing his case within exception 1 of s 300 of the Code.

that the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Code, or within any special exception or proviso contained in any other part of the Code, or in any law defining the offence is discharged if there is a reasonable doubt as to the existence or non-existence of an exception.

The last of the Federal Court/Supreme Court's decisions on s 105 of the Act is *Nagappan all Kuppusamy v PP* [1988] 2 MLJ 53, where the Supreme Court restated the advice in *Looi Wooi Saik* not to read s 105 in isolation but in relation to the Act as a whole, and in particular ss 101 and 102 which require the prosecution to prove the guilt of an accused person.

The explicit and unambiguous statement of law on the standard of proof of an exception is found however in *Tenaga Pharmed Sdn Bhd v PP and other applications* [1994] 2 MLJ 23, where Mohd Hishamudin JC (as he then was) — on the exception under s 4(4) of the Trade Descriptions Act 1972 to an offence under s 3 of that Act — held that (at p 31):

> ... by virtue of s 105 of the Act, the onus was on the defence to adduce evidence to prove (and not for the prosecution to prove otherwise) that the act or activity of the appellants came within the exception.

The construction of s 105 of the Evidence Act of Ceylon (as that country was then known), which is similar to our s 105, was considered by the Privy Council in *Jayasena v R* [1970] 1 All ER 219, where it was held — rejecting the contention that on the true construction of s 105 of the Evidence Act of Ceylon and the meaning of 'burden of proving', the burden imposed by s 105 is merely the burden of adducing some evidence in support of the general or special exception in the Code — that (at p 222, per Lord Devlin):

> ... it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by s 105 can be anything less than proof in accordance with s 3.

On proof according to s 3, it is trite that in criminal proceedings, the burden of proving or disproving an issue when it is on the accused — as when the law presumes a fact or issue against the accused 'unless the contrary is proved' — is no higher than that of a party to a civil suit, ie the balance of probabilities (see *Loo Hwee Hong v PP* [1978] 2 MLJ 164 and *Akin Khan bin Abdul Rahman v PP* [1987] 2 MLJ 217); and if the court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded in proving to the contrary the presumption that has arisen (see *Mohamed Yusof bin Hj Ahmad v PP* [1983] 2 MLJ 167 at p 171).

The *locus classicus* on the standard of proof to rebut a statutory presumption is *PP v Yuvaraj* [1969] 2 MLJ 89, where the Privy Council, per Lord Diplock said (at p 92):

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the

> facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal; whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact being 'disproved' there can be no grounds in public policy requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

An accused who claims the benefit of an exception in the Code has, therefore, the onus of proving on a balance of probabilities the circumstances bringing the case within the exceptions, and the burden of rebutting the statutory presumption of the absence of those circumstances.

A fusion of *Othman bin Ahmad, Ikau anak Mail, Looi Wooi Saik, Nagappan a/l Kuppusamy, Tenaga Pharmed, Jayasena* and *Yuvaraj* on the onus and standard of proof of an exception in the Code and the meanings of 'burden of proving' and 'proved' are therefore the following:

(i) the prosecution has the onus of proving the guilt of an accused;

(ii) an accused who claims the benefit of exceptions in the Code has the onus of proving, on a balance of probabilities, the circumstances bringing the case within any of the exceptions in the Code or within a special exception or proviso in any part of the Code, or in any law defining the offence, and until such proof to the contrary the court shall presume the absence of those circumstances;

(iii) an accused who claims the benefit of exceptions in the Code will not succeed if there is nothing in the prosecution evidence or defence evidence to support the exception; and

(iv) if there is something to support the exception, the onus of proof is sufficiently discharged if there is a reasonable doubt as to the existence or non-existence of the circumstances bringing the case within the exception.

In the instant appeal, the evidence adduced by the prosecution in the trial below may be summarized as follows. The respondents, who are brothers, were the first cousins of the deceased, one Lee Kean Kee. At the material time in question, three families of Lees, all closely related, were residing at 22 Leboh Gat Prangin, Georgetown ('the house'), a pre-war double-storey shophouse with two bedrooms and a hall on the ground floor; and three bedrooms and a kitchen on the top floor. The deceased, his wife (PW9), his mother, his sister (PW8) and two young sons occupied a room on the top floor. The respondents and their sister occupied two rooms, one on the ground floor and one on the top floor. The deceased's third uncle and

A third aunt occupied two rooms, one on the ground floor and one on the top floor.

At about 3pm on 27 March 1994, the deceased and PW9 were seated at a table outside their room having their afternoon meal. The respondents were on the ground floor. The others in the house were PW8, PW8's third B aunt and her two nephews. The deceased's mother had taken the deceased's sons for a walk.

PW8, on the ground floor, was asked by the second respondent to call the deceased to come to the ground floor as he had something to discuss with the deceased. PW8 climbed to the top floor and conveyed the second respondent's request to the deceased. The deceased replied that he C would speak to the second respondent after he had finished his meal. PW8 then entered her room.

The event that followed — the prosecution's version, given by PW8 and PW9 — was that the respondents attacked the deceased with a wooden stool and a stick.

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According to PW8, after she conveyed the second respondent's request to the deceased and was in her room, the telephone rang in the respondents' room upstairs. That was followed by the sound of a commotion outside her room. She rushed out to investigate. She saw the first respondent hitting the deceased's head with a 'kerusi' (line 1 at p 48 of the appeal E record ('the AR')). The first respondent struck the deceased several times with the wooden stool. Thereafter, the deceased ran to the kitchen on the top floor, and arming himself with a kitchen knife, he defended himself. Meanwhile, the second respondent who had entered and come out of his room on the top floor with a stick, joined the first respondent's attack on the deceased. The second respondent struck the deceased repeatedly until F the stick broke (lines 5–8 at p 49 of the AR). The respondents continued their attack even as the deceased was retreating to the staircase and they stopped only when the deceased fell down the stairs; the deceased retreated a few steps down the stairs, and then rolled to the bottom of the stairs. Lying at the bottom of the stairs, the deceased's face and body were G covered with blood; blood was flowing as an ambulance was called. A neighbour sent the deceased to the hospital, where he died in the early hours of 29 March 1994. PW8 further testified that PW9, in trying to stop the respondents' attack, sustained injuries to her head and fingers, but both respondents were not touched by any injury. PW8 maintained that the deceased was not armed when he was first attacked and only armed H himself after he was attacked.

The defence's version was that the deceased had attacked the first respondent with a kitchen knife and the respondents defended themselves. That was evident from the questions by learned counsel and the replies from PW8 and PW9 ....

I [His Lordship set out the cross-examination of the witnesses and continued:]

That exchange of questions and answers was followed by learned counsel putting it to PW8 that she was fabricating her evidence. That was denied by PW8. Thereafter, the further cross-examination of PW8 was

resumed in the manner of an examination-in-chief, with the result that PW8's testimony incriminating the respondents was reinforced, so seen in the following transcript of the cross-examination. A

[His Lordship proceeded to set out the cross-examination of the witnesses and continued:]

As for PW9, she testified that the first respondent approached her and the deceased (followed shortly by the second respondent) while they were having their meal. The first respondent accused her of having taken his shoe. She denied the allegation but the first respondent gave her a slap. She also testified, following the prosecuting officer's question, 'apa jadi lepas OKT1 (the first respondent) dan kemudian Ah Hock (the second respondent) datang?', as follows: B C

A: Bila OKT datang dan beritahu kasutnya hilang dan suami saya kata lepas makan baru cakap hal itu.

Q: Apa jadi?

A: Suami saya, lepas kami makan kenyang, baru kami turun bawah bincang. Suami kata kami baru mula makan dan belum kenyang lagi dan sebelum kami habis makan, OKT1 telah memukul suami saya dengan bangku itu dan suami saya terus pergi ke dapur untuk menahan kerusi itu. D

Q: Kerusi yang digunakan untuk pukul suami kamu diambil dari mana?

A: Di tempat kami makan.

PW9 said that she tried to stop the attack, but she was struck on her head and hand by a wooden stool. After the first respondent had started his attack, the deceased ran into the kitchen and armed himself with a kitchen knife. Meanwhile the second respondent, who rushed into his room and came out with a stick, about three feet long, joined the attack on the deceased. Both respondents struck the deceased several times on the head and back ('bahagian belakang') with the stool and stick. She pleaded with the respondents to stop, but they continued their attack ('mereka teruskan'). The deceased attempted to fend off the respondents' attack, but fell about three steps down the stairs. As the deceased was getting up — she said that by then the knife had fallen to the bottom of the stairs — the respondents kicked the deceased, who fell to the bottom of the stairs. She rushed to the deceased and tried to lift him. However, the deceased's body was stiff and straight and she failed to lift the deceased off the floor. The deceased was bleeding from the nose. She appealed to a neighbour to call an ambulance. On 29 March 1994, the deceased passed away at the Penang General Hospital. She also testified that the accused had not sustained any injuries. E F G H

PW9 was then cross-examined in a style reminiscent of that upon PW8. The defence's case that the respondents defended themselves, disclosed in the cross-examination of PW8, was again put to PW9.

[His Lordship then set out the cross-examination of the witnesses and continued:] I

The trial court's finding — "line of defence' tidak mempertikaikan fakta pergaduhan di antara si mati dan OKT-OKT dan OKT-OKT cuba membawa pembelaan mempertahankan diri' — given the character of the cross-examination and the accused's prior notice of the defence, was therefore entirely supported by the evidence.

It was not in dispute, *qui non negat fatetur*, that the deceased succumbed to the injuries that he sustained on 29 March 1994. The pathologist (PW7) who conducted the post-mortem testified to the following external injuries on the deceased's head, face, shoulders, arms and legs:

(1) collection of blood in the region of the eyes;

(2) a semicircular incised wound on the right temporal region measuring 18cm in length;

(3) strict transverse incised wounds measuring 5cm in length — 2cm above the right eyebrow;

(4) an oblique abrasion over the vertex of the head measuring 4.5 x 1cm;

(5) abrasion measuring 1.5 x 1cm over the right parietal region, 8cm above the left eyebrow;

(6) brushed abrasion on the right side of the face and neck region covering an area 16 cm x 10cm;

(7) abrasion above left eyebrow measuring 2 x 1cm;

(8) abrasion measuring 5 x 0.3cm on the right occipital region, ie behind the right ear;

(9) marked bruising around the right ear;

(10) a tram line pattern abrasion on the right temple region coming to a point 5cm from the lateral angle of the left eyes; the end measuring 3 x 0.5cm while the other measuring 4.5 x 0.5cm;

(11) abrasion on the left side of the neck measuring 1 x 0.5cm;

(12) abrasions, mid-sternal region, 2 x 1.5cm and 0.5 x 0.5cm;

(13) a bruise to the left of the mid-sternal region measuring 2 x 0.3cm;

(14) abrasion on the posterior medial aspect of the left arm, 3 x 1cm;

(15) abrasion on the surface of the left forearm, 2 x 1.5cm.;

(16) abrasion 1.5 x 0.5cm on the interior surface of the left forearm;

(17) abrasion, left shoulder joint 4 x 1cm;

(18) abrasion, left supra scapular region, 6 x 8cm;

(19) marked bruising in the left scapular region measuring 13 x 4cm;

(20) abrasion on the left scapular region, medial side, 3 x 2cm;

(21) 4 small abrasions over the right scapular region, the largest measuring 0.4 x 0.3cm;

(22) marked bruising on the left upper arm, lateral surface, measuring 7 x 7cm;

(23) liner abrasion on the right forearm, lateral surface, measuring 4 x 5cm;

(24) abrasion 3 x 2cm — 3.5cm below injury (23) over the right forearm;

(25) linear abrasion on the right knee joint measuring 4 x 0.5cm;

(26) oblique abrasion on the right lower leg 4 x 0.3cm;

(27) linear abrasion measuring 3 x 0.5cm on the upper medial surface of the left knee joint;

(28) longitudinal abrasion over the left skin — 4 x 0.5cm.

PW7 also testified that the post-mortem he conducted revealed the following internal injuries:

(29) sub-Galilee haemorrhage (between the scalp and the skull) all over the head;

(30) on removal of the skull cap, a large extra-dural (outside the covering of the brain) haematoma on the right front region measuring 5 x 4cm. The brain was swollen and tense. Marked sub-dural haemorrhage on the right frontal region with sub-archnoid haemorrhage (internal bleeding) at the base of the brain between the covering of the brain surface;

(31) an oblique fracture running from the right frontal region, across the right anterior crannial fassa through the sella turcica and ending at the left middle carrenial fossa (fracture of the skull);

(32) fracture at the left frontal sinus (eye region) and ethamoidel sinuses;

(33) fracture of the right upper orbital margin and the left orbital margin medial end;

(34) fracture of the right hexilla (cheek bone) and nasal bone on the right side;

(35) sub-archnoid all over the brain; and

(36) a huge laceration of the right frontal lobe with marked intra haemorrhage.

The prosecution tendered six precious photographs (P6A–P6F) — since a picture tells a thousand words — graphically showing the extent and magnitude of the deceased's injuries.

It was not denied that PW7 was the only competent witness to speak about the nature of injuries and the cause of death, and gave his testimony on the injuries and the cause of death — 'the severe head injury due to blunt trauma to the head' — 'not as an expert but as one who observed relevant facts' (see *Sarkar on Evidence* (14th Ed) Vol 1 at p 799). According to PW7, the head injuries were serious, the most serious being the fracture of the skull with brain damage and haemorrhage and 'the cause of death was the severe head injury due to blunt trauma to the head'.

Apart from his testimony on facts, PW7 gave the following unsolicited opinion:

> In my opinion after having visited the scene, the injuries I saw at the post mortem examination were consistent as a result of the deceased having fallen down to the flight of steps from the upper floor.

That opinion was, however, neither firm nor resolute as PW7 qualified his opinion with regard to the abrasions:

> ... could had (sic) been caused by him going down the staircase except one of the injuries, in my opinion — ie P6E and F — left side of face — tramline could had been caused by blunt object pointed.

and with regard to the injuries shown in photographs P6E and F (fracture of the left cheek bone), he said that he did not think it could have been caused by a fall from the stairs (p 39 of the AR).

A It must be said that much as 'it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury' (*Sarkar on Evidence* at p 798), it is also improper to accept a physician's opinion on how injuries were caused, unless the opinion is on the kinds of weapon used as a result of which wounds of a given description might be caused, or whether wounds of a B given character were caused before or after death if it is convincing and satisfactory (*Sarkar on Evidence* at p 800). According to the learned authors of *Sarkar on Evidence*, 'a doctor's evidence must be appreciated like the evidence of any other witnesses' and 'to rely upon the medical evidence as decisive is to render the other evidence entirely fruitless'; and 'when there C is overwhelming evidence of eyewitnesses the medical evidence which is contrary to that of eyewitnesses can be disregarded', and 'if the medical evidence is obscure and oscillating it is not proper to discredit the direct evidence of witnesses', and 'when there are alleged eyewitnesses of physical violence said to have caused death the value of medical evidence is only corroborative', and 'a judge is not entitled to discard the direct evidence of D credible and unimpeachable witnesses deposing to things observed with their own eyes merely upon the opinion of a medical witness that those things could not have been done'.

In the trial below, both eyewitnesses (PW8 and PW9) were firm and resolute that the respondents struck the deceased with the stool and stick E — the physical violence on the deceased — and both were not discredited. The defence's case of self-defence was an implied admission that force and violence were indeed applied on the deceased. That being the case at the stage of the prosecution's case, the pathologist's opinion 'that the injuries ... were consistent ... of the deceased having fallen down to the flight of F steps from the upper floor' was not only out of step with the evidence of credible and unimpeachable witnesses who said they actually saw the violence but also with the defence's case of self defence.

Moreover, the injuries to the deceased were so extensive and severe that it was not reasonable that that many injuries could have resulted from a fall from one flight of steps; as reasonably, the first impact would absorb G the full force of a fall and multiple injuries — some equally severe and on diametric parts of the deceased's head and upper body — could not have been the result of a fall.

The pathologist's opinion, in a flux state and resting on conjectural premises, was far from reasonable or convincing. It was also against the H weight of the incontestable evidence — the injuries — and had little probative weight (see *PP v Selvraj Subramanian* [1985] 2 MLJ 190, where a doctor's testimony that the deceased 'could have suffered concussion and could have asphyxiated accidentally' was not accepted by the court).

That the deceased sustained all his injuries as he fell from the stairs, I was also taken up by learned counsel in his cross-examination of PW9:

Q: Dia jatuh tangga dan kepalanya terkena simen di pangkal tangga seperti P2C?

A: Tak setuju.

Q: Ketika jatuh suami kamu dapat cedera di badannya?

A: Saya tak setuju.

That, however, was notice of the defence's case (see *Lin Lian Chen v PP* [1992] 2 MLJ 561) and not evidence that the deceased sustained his injuries from a fall, although some injury (but not to the extent of the deceased's) could have resulted from a fall. In the particular facts and circumstances of the instant appeal: (i) that the injuries on the deceased — and there was a frightful list of 28 external injuries and a host of internal injuries covering the body and head plus the severity of many — were consistent with the application of force and not with a fall(s); (ii) that the nature of the injuries corroborated the eyewitnesses' testimony that violence was used against the deceased; (iii) that the pathologist's factual testimony on the cause of death — 'the severe head injury due to blunt trauma to the head' — was not inconsistent with the use of the stool and stick — was not the circular incised wound on the right temporal region consistent with infliction by the round seat of the stool; and (iv) that the injuries inflicted by the accused were not incompatible with the defence case of self-defence, pointed only to the one irresistible conclusion — that the accused caused the death of the deceased.

Therefore, despite a maximum evaluation of the prosecution evidence, there was most undoubtedly a case within the meaning of s 173 of the Criminal Procedure Code (FMS Cap 6) to be answered by both respondents; the trial court had to presume the absence of circumstances bringing the case within s 96 of the Code; and as the case unless rebutted would warrant a conviction, the respondents were justly called to enter their defence — to cast a reasonable doubt on the prosecution's case or to prove the existence of circumstances bringing the case within the general exception disclosed — to rebut the prosecution case.

Both respondents testified that the deceased had attacked the first respondent with a knife. They said that the first respondent fended off — first with the stool and then with the stick — the deceased's attacks.

According to the first respondent, there was a heated argument between him and the deceased (pp 158–159 of the AR). The deceased was very angry, and he tried to go to the kitchen, while the second respondent tried 'to cool him down ... but he managed to struggle free, took a step back into the kitchen and came out with a knife in his hand' (p 159 of the AR). The first respondent identified P3 as the knife in question.

The first respondent 's testimony continued as follows: 'I told him to put down the knife. At that, the wife also got up and at the same time he lunged at me. I grabbed the stall stool the wife had sat on to protect myself. At the same time I retreated' (p 160 of the AR). 'At the same time he was lunging (sic) at me, Ah Hock rushed into the room for safety. He was coming towards me all the time'. The deceased 'was attacking me'.

His learned counsel asked, 'apa kamu buat dengan bangku?' and the first respondent answered, 'I was defending myself. At that time of fear and panic, I know I had to disarmed (sic) him'. His learned counsel also asked how he had defended himself, and the first respondent answered:

> I was holding stool at the seat and pointed the legs towards to find him 2–3 times, I felt a sharp grazing pain on my right hand.

The first respondent continued:

A I missed hold, the stall and dropped the stool. At the same time, I remember Poh Hock passed me a stick.

The first respondent identified P4A and B as the stick. He said that he had used the stick to fend off the deceased's attack. The deceased lunged towards him as he was retreating towards the staircase:

B While retreating, the wood snapped into two. I was holding the wood at the middle and while retreating it was caught in the knob of railing and snapped into two. At that instant when the wood snapped, I felt another sharp pain at my right elbow. Immediately I was pressed against the wall of the first room near the door of room 'C'... .

C ... I still has (sic) a piece of wood in my right hand. While pinning me against wall and pushing me, in order to have a better leverage, he missed the steps ... . He fell down the stairs. He fell halfway ... I was surprised at the speed with which he got up from the staircase and lunged towards me, I saw ferious (sic) look in his face and the knife was still in his hand. So with the wood in my hand, I tried to prevent him from coming up at me ... . He managed to break through my defence and barely missed by grazing my D neck. I was pressed against the door ... I managed to catch hold of his left hand with the knife. He missed the staircase and went off balance and while attempting to balance himself, he missed his steps, turned slightly (sic) to the right and his right hand tried to grab the railing but he missed it and he went flying down. I heard his head hitting the cement downstairs. I saw his (sic) motionless (p 163 of the AR).

E The first respondent testified that he realized then that something was very wrong. He dialed 999 for the police or ambulance. When he got through to the operator, he was told that someone had already telephoned for an ambulance; he was told to wait for the ambulance. As he and the second respondent were waiting for the ambulance, a large crowd had gathered F outside the house. The first respondent was set upon by a section of the crowd. The second respondent came to his aid but they were outnumbered and they ran for their lives. At MacCalum Street, they chanced upon two policemen, to whom they related the events in the house. A police patrol car took them to the Jalan Petani Police Station. At the police station, he G informed one Insp Kooi that he wanted to lodge a report and to have his injuries treated. He did not lodge a report as Insp Kooi said to him, 'what to report after we wallop a person so serious and my injury was not serious' (p 164 of the AR). The first respondent denied all knowledge as to how PW9 had sustained her injury. He also denied that he had struck the deceased with the stool or had kicked the deceased.

H Notwithstanding the first respondent's denials, there was a tacit admission that both respondents inflicted violence on the deceased in the following replies by the first respondent to the questions of his counsel:

Q: Ada pukul ... dengan kayu?

I A: I was fending off his attack (p 165 of the AR).

...

Q: Adik awak dikatakan memukul si mati?

A: It was very fast. The wife was behind the deceased and was shouting when Poh Hock tried to pass the wood to me.

Q: PW9 kata OKT2 juga tendang suaminya? A

A: No.

...

Q: Si mati ada luka di pipi kiri tahu?

A: While fending off a possibility when the wood snapped, a piece might have caught his face. He was rushing towards at all times. B

The second respondent testified similarly that the deceased had a kitchen knife (P3). His testimony was as follows:

Q: Bila lihat dia ambil pisau apa kamu buat?

A: Saya terkejut dan terus balik ke bilik saya. C

Q: Apa Ah Kee buat dengan pisau?

A: Dia terus serang abang saya OKT1.

Q: Bila dia serang abang kamu, dia pegang pisau tangan mana?

A: Tangan kiri.

Q: OKT1 buat apa? D

A: OKTI terus ambil sebuah kerusi untuk pertahankan diri.

Q: Melihat abang kamu diserang ada buat apa-apa?

A: Saya nampak abang saya menahan dengan kerusi 1–2 kali terhadap pisau si mati. Lepas itu kerusi yang dia pegang jatuh atas lantai. Saya pun terus ambil batang kayu dan hulur pada abang saya. E

The second respondent also testified how the stick — and he said that the first respondent held it in the middle — had broken into two as it struck the staircase railing; how the deceased with a knife in hand ran up the stairs and how the deceased fell to the cement floor at the bottom of the stairs. He said that he only saw the deceased fall once from the stairs. He denied that he had struck the deceased with the stick, and he said that he was the middleman trying to stop a fight. F

The remaining defence witness (DW2) tendered a medical certificate (D15) on the first respondent's injuries — a wound over his right elbow, pain to the neck and two old abrasions.

It is fitting that the law relating to self-defence is now outlined before comment on the trial court's evaluation of the defence evidence. G

In *Musa bin Yusof v PP* [1953] MLJ 70, the Court of Appeal held as follows (at p 71):

> The law in this country gives greater latitude to a person who is attacked than does the law in England. In England, if self-defence is to be successful, the attacked must attempt to disengage himself from the attack, and his killing the assailant is only excusable if there was no other way of saving his life. The law which is applicable in this country is fully set out in *Alingan Kunhinayan & Anor v The Emperor* ILR 28 Mad 454. The learned sessions judge in that case made the following observation: H I
>
> > 'It is urged on behalf of the first accused that he was justified in the exercise of his right of private defence of his person in stabbing deceased when he attacked him with a knife. First accused had undoubtedly a right to defend himself but I think it is clear that he exceeded the right of private defence which he possessed. First accused was certainly not

justified in wresting the knife from the deceased and inflicting a dangerous wound in the chest. There is no reason, I think, to suppose that the first accused could not have escaped further injury by resorting to less violence or by running away. It was not necessary for first accused's own preservation that he should have inflicted such grievous bodily harm.'

The Court of Appeal commented on this passage as follows:

'On the facts of the case we cannot agree with the view of the law taken by the learned judge. We do not think it can be said that the first accused exceeded the right of private defence. The learned judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But, this is placing a greater restriction on the right of private defence of the body than the law requires.

The principle applicable to a case like this is that laid down by Mayne:

"But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe that the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, when the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The all important facts in connection with the question whether the first accused exceeded the rights of private defence of his body when he gave the stab with his knife which proved fatal to the deceased, are that the deceased was the first to use the knife and had inflicted a wound on the first accused which might well have proved fatal.'

In *Lee Thian Beng v PP* [1972] 1 MLJ 248, the Federal Court, per Ong Hock Sim FJ, made the following observations on the right of private defence (at p 252):

... s 99 of the Penal Code provides that the right of private defence in no case extends to the infliction of more harm than is necessary to inflict for the purpose of defence. Subject thereto, s 100 provides that the right of private defence extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence; and it continues as long as such apprehension of danger to the body continues. The plea of private defence is one of the general exceptions set out in Ch IV of the Penal Code, proof of which by virtue of s 105 of the Evidence Ordinance rests on the accused. In a few words the principles to be applied in this case have been set out as above.

...

... it is clearly the law, with regard to the use of force in self-defence, that there must be no alternative to its recourse. As Lord Morris of Borth-y-Gest said recently in *Palmer v R* [1971] 2 WLR 831 (at pp 839 and 843–844):

> 'An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection and its validity will be just the same as in a case where death has resulted. In its simpliest form the question that arises is the question: Was the defendant acting in necessary self-defence?'
>
> ...
>
> 'In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains than the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will be no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in *DeFreitas*' case [1960] 2 WLR 523 that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the jury.'

That retaliation cannot exceed what is reasonably necessary to avert an assailant's threat was also taken up in *PP v Abdul Manap* [1956] MLJ 214, where it was held that the accused who had struck the first blow — but was seriously assaulted by the complainant in retaliation — was entitled to exercise his right of private defence, and in that case the accused stabbed

the complainant, as the complainant's retaliation was of such a violent nature that it exceeded his private defence.

It is timely, with the above outline, to recall that the deceased, said to be the attacker by the respondents, had 28 external injuries on his body and head as well as multiple internal head injuries, while by comparison the first respondent had what could only be described as a nick on his right elbow. It is equally timely to bear in mind that with opposing versions, the injuries on the deceased and the first respondent were the incontestable evidence and the acid test of judging which version was supported by the incontestable evidence.

The defence, save for latent admissions, was an outright denial that the respondents had inflicted any injury on the deceased. According to the defence, the first respondent 'was fending off the deceased's attacks' while the second respondent tried to stop a fight, and the deceased's injuries, save for the 'possibility when the wood snapped, a piece might have caught his face', were the result of the deceased's fall. As said hitherto, the respondents' denial that they inflicted injury on the deceased and their claim that the deceased's injuries were the result of a fall(s), were not consistent and indeed were refuted by the deceased's extensive injuries.

It was not just that the deceased had 28 external injuries while the staircase had 17 steps such that the deceased, if he fell on every step like water cascading, would only have had 17 external injuries, but also that the injuries being all over the deceased — on the left and right sides of the head (P6E and F, P6I and J); on top of the skull (P6C); on the shoulder joint; on the right temporal region and above the right eyebrow; over the right parietal region above the left eyebrow; on the right side of the face and neck region; on the left side of the neck; behind and around the right ear; the mid-sternal region; the posterior medial aspect of the left arm; the surface of the left forearm; the interior surface of the left forearm, the left supra scapular region; the left scapular region; the right scapular region; the lateral surface of the left upper arm; the lateral surface of the right forearm; the right forearm; the right knee joint; the right lower leg and the upper medial surface of the left knee joint — belied the accused's denial.

The graphic account of the deceased's external injuries provided by the six photographs (P6A–PF) and the internal injuries reflecting more accurately the extent and magnitude of the deceased's injuries were sure proof that violence was inflicted on the deceased. The deceased was bleeding all over the head, between the scalp and the skull (sub-galaleo haemorrhage). His skull was smashed in and the brain was swollen, tense and bleeding internally (extra-dural haematoma on the right frontal region, sub-dural haemorrhage on the right frontal region with sub-archnoid haemorrhage at the base of the brain between the covering of the brain surface). There was an oblique fracture of the skull running from the right frontal region across the right anterior crannial fassa through the sella turcica and ending at the left middle carrenial fossa. There were fractures, in the eye region (left frontal sinus and ethamoidel sinuses); right upper orbital margin and the left orbital margin medial end; fracture of the right cheek bone (right hexilla) and nasal bone on the right side; bleeding (sub-arachoind) all over the brain and a huge laceration of the right frontal lobe

with marked intra haemorrhage. There could be no doubt that much violence was used.

The defence that the deceased had attacked the first respondent was the claimed justification for the use of force to repel the deceased's attack. Yet, most of the fractures on the deceased's head were so severe that reasonably any one of the blows that caused the fractures — top of the skull; either side of the head; eye region; right upper orbital margin and the left orbital margin medial end; right cheek bone and nasal bone on the right side — would have stopped the deceased dead in his tracks and the threat, if any, would have been over.

To recapitulate, the first respondent's testimony on the deceased's attack from the point where his counsel asked, 'apa kamu buat dengan bangku?' was:

> I was defending myself. At that time of fear and panic, I know I had to disarmed him ... I was holding stool at the seat and pointed the legs towards to find him 2-3 times, I felt a sharp grazing pain on my right hand ... I missed hold, the stall and dropped the stool. At the same time, Poh Hock passed me a stick ... I used the stick to fend off the deceased's attack....the deceased lunged towards me as I was retreating towards the staircase ... while retreating, the wood snapped into two ... when the wood snapped, I felt another sharp pain at my right elbow ... I was pressed against the wall of the first room ... I still has (sic) a piece of wood in my right hand. While pinning me against wall and pushing me, in order to have a better leverage, he missed the steps ... . He fell down the stairs. He fell halfway ... I was surprised at the speed with which he got up from the staircase and lunged towards me, I saw ferious (sic) look in his face and the knife was still in his hand. So with the wood in my hand, I tried to prevent him from coming up at me ... . He managed to break through my defence and barely missed by grazing my neck. I was pressed against the door ... I managed to a watch hold of his left hand with the knife. He missed the staircase and went off balance and while attempting to balance himself, he missed his steps, turned slightly (sic) to the right and his right hand tried to grab the railing but he missed it and he went flying down. I heard his head hitting cement downstairs. I saw his (sic) motionless.

Going by that testimony, the deceased twice lost his footing; on the first occasion, the deceased fell halfway down the stairs but suffered no injury — 'I was surprised at the speed with which he got up from the staircase and lunged towards me, I saw ferious (sic) look in his face and the knife was still in his hand' — and on the second occasion, the deceased 'went flying down'. Then, how could the second fall, similarly from a slip that caused no injury on the first tumble, be the cause of all the horrendous injuries to the deceased's head and all the extensive injuries covering the deceased's body?

It must also be asked how was it that the first respondent — who said he was twice pinned by the deceased against the wall and then against the door — was not injured, and whether the deceased, with the first respondent pinned against the wall, push the first respondent and should manoeuvre for a better leverage, when a blow with the knife, if indeed the deceased was attacking the first respondent, was all that was needed? And how could the possibility admitted by the first respondent — 'when the wood

A snapped, a piece might have caught his face' — have caused the fracture on the cheek bone shown in photographs P6E and P6F?

The deceased's injuries, given the due consideration that it richly deserved, testified empathically that the respondents bludgeoned the deceased's head with unrelenting blows even after the deceased could offer no resistance, let alone threat; the extensive abrasions on the shoulder joint and the back of the deceased (see P6G) showed that the deceased was struck unrelentingly even when his back was turned to his assailants.

The injuries on the deceased were such that even if there was retaliation — and there was no evidence to support this — it was too excessive as more harm than was necessary was inflicted for the purpose of self-preservation (see *Lee Thian Beng v PP*) when the contest, if any, was long over — and when there was no longer any danger or reasonable apprehension of danger (see *Musa bin Yusof v PP)* it was therefore not self-defence but wholly out of proportion to the necessities of the situation. Continued violence on the deceased, when one of the head fractures would have debilitated the deceased, was pure aggression. Again, on the particular facts and circumstances in the trial below, the undoubted evidence would not admit self-defence. It was just not reasonable nor logical to accept the respondents' asserted self-defence. That the fall(s) caused the injuries was totally against the overwhelming weight of the incontestable injuries suffered by the deceased. The entire defence, even imperceptibly, was not even a plausible or acceptable explanation, and offended all good sense. Indeed, it was incredible and was not believable.

To sum up, two eyewitnesses deposed to the respondents' attack on the deceased and the injuries on the deceased were consistent with violence; the defence — 'fending off the deceased's attacks' — was an implied admission that the respondents used violence on the deceased; save for violence, the deceased's injuries could not be explained away by a fall(s); the Respondents inflicted the injuries that the deceased succumbed to; self-defence was not proved; even if it was in retaliation, the retaliation was far too excessive and beyond the limits of legitimate self-defence; no reasonable doubt whatsoever was cast by the respondents on the prosecution's case. There was no doubt whatsoever that both respondents were guilty as charged.

Yet, the trial court acquitted both respondents. According to the learned sessions court judge:

> Mahkamah mendapati fakta bahawa cara OKT1 memegang bangku seperti yang diterangkannya dan oleh PW8 adalah cara 'defensive' mencegah serangan dan bukan 'aggression'.
>
> Mahkamah berpendapat bahawa dalam banyak keadaan, seseorang yang bersenjata pisau adalah 'aggressor' dan melakukan serangan.
>
> Tempat pergaduhan amat sempit dan tidak mungkin OKT1 yang 'right-handed' boleh memukul dengan bangku kerana 'passage way' itu cuma dua kaki lebarnya. Andainya dia mengangkat bangku ke atas melepasi kepalanya dalam proses itu membolehkan si mati menyerbu rapat ke diri OKT1 dan menggunakan pisau. Begitu juga dengan kayu P4A+B yang patah dalam pergaduhan itu.

Lebar 'landing' tangga cuma 3 kaki 4 inci. Bagi seseorang melakukan tendangan yang keras dan padu, seseorang perlu menghayun kakinya jauh ke belakang dahulu dan kemudian ke depan. Pada hemat Mahkamah, ini tidak mungkin dilakukan di tempat 'landing' tersebut.

Oleh yang demikian, Mahkamah menolak cerita PW9 yang dia melihat kedua-dua OKT menendang si mati dengan kuat sedangkan ini tak mungkin dilakukan di tempat itu.

OKT-OKT juga tidak mungkin dapat bersama dengan OKT1 di 'landing' serentak memandangkan kedudukannya di belakang sekali dan di hadapannya ialah PW9. PW9 berada di belakang si mati dan OKT1 di hadapan berhadapan dengan si mati dan berundur.

Mahkamah memutuskan bahawa penjelasan dan penerangan OKT-OKT adalah munasabah dan wajar diterima bagi menimbulkan keraguan-keraguan munasabah ke atas kes pendakwa di mana mereka telah menggunakan pembelaan mempertahankan diri dan si mati jatuh ke bawah kerana dia gagal mengimbangkan dirinya di tangga.

Dalam erti kata yang lain, pendakwa gagal membuktikan niat menyebabkan homisid salah semata-mata atas circumstances OKT1 dan OKT2 memanggil si mati berbincang, OKT1 naik ke atas menjawab telefon dan OKT2 ada dalam bilik dan bila pertengkaran berlaku OKT2 campur tangan dengan memegang bahu si mati menyuruhnya duduk. Fakta ini tidak dapat diguna sebagai keterangan ikut keadaan niat bersama. Kecualilah kalau dibuktikan mereka berdua dapat menangkap si mati dan bersama-sama melontarnya ke bawah melalui tangga. Tetapi tiada keterangan sedemikian. Yang menjadi isu ialah OKT1 dan OKT2 dikatakan menendang si mati dan ini tidak konsisten di antara keterangan PW9 dan keadaan tempat di mana tendangan yang kuat dan padu tidak mungkin dapat dilaksanakan secara serentak dua orang ke atas si mati.

Most obviously, the trial court's reasoning was afflicted by acute errors and glaring lapses. There was not even a cursory look at the deceased's injuries, when a careful consideration of the injuries on the deceased and the first respondent was absolutely essential for a proper evaluation of the respondents' professed self-defence.

In its failure, the trial court failed to recognize and address the crucial evidence put forth by the incontestable injuries.

There was also a failure to recognize that the extensive and wide ranging injuries on the deceased constituted an inviolable and unassailable truth against which all other evidence must be tested and verified; if there was no such failure, then how could: (i) the finding that the first respondent held the stool in defence and not aggression; and (ii) the observation — 'dalam banyak keadaan, seseorang yang bersenjata pisau adalah "aggressor" dan melakukan serangan' — seemingly said without a care for individual facts and circumstances, where it was the 'aggressor' who had crushing injuries and the 'defender' had a nick on his elbow, be explained and be rationalized?

The rejection of the possibility that the respondents could have struck the deceased was incomprehensible, as there was no doubt whatsoever that the respondents had inflicted the injuries, given the nature and extent of the deceased's injuries and given the respondents' tacit admission of retaliation in the claimed self-defence. The reasons for the rejection of the possibility that the respondents could have struck the deceased — (i) the

A place was narrow and it was not possible for the first respondent, a right-hander, to have struck the deceased with the stool; (ii) if the respondents raised their stool and stick to strike, the deceased could have closed in and stabbed the respondents; (iii) the width of the staircase landing was 3 to 4 feet; and it was not possible for a person to execute a kick within the available space — were pure and unbridled conjecture, and went against the facts and realities of the case.

B

The finding that 'OKT-OKT juga tidak mungkin dapat bersama dengan OKT1 di "landing" serentak memandangkan kedudukannya di belakang sekali dan di hadapannya ialah PW9. PW9 berada di belakang si mati dan OKT1 di hadapan berhadapan dengan si mati dan berundur' needs no comment as it is completely unintelligible and no sense could be made out. The finding that the respondents' explanation was reasonable and sufficient to cast a reasonable doubt on the prosecution's case — as the respondents defended themselves and the deceased fell as he lost his balance on the steps — was a serious misdirection on the burden of proof as the respondents were required to prove on a balance probabilities, and not just by casting a reasonable doubt, that they were defending themselves. As it was, where not a word was said in the grounds of judgment, there is reason to believe that the law relating to self-defence was not acquainted nor appreciated, for if it was, the claimed self-defence would have been unhesitatingly rejected.

C

D

E

As for the trial court's concluding finding that '"circumstances" OKT1 dan OKT2 memanggil si mati berbincang, OKT1 naik ke atas menjawab telefon dan OKT2 ada dalam bilik dan bila pertengkaran berlaku OKT2 campur tangan dengan memegang bahu si mati menyuruhnya duduk' was not circumstantial evidence of common intention; unless both respondents together threw the deceased to the ground floor, it was a misdirection of the law that common intention could only be proved if the respondents had carried out an identical act or deed.

F

Section 34 of the Code reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

G

In *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232, the Federal Court, per Hashim Yeop A Sani J (as he then was), enunciated s 34 as follows (at pp 267–268):

H

> It is also a common sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined.

I

The Privy Council, in *Mahbub Shah v King Emperor* (1945) LR 72 IA 148, construed s 34 of the Indian Penal Code — which is in identical terms to our s 34 — as follows:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all', nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. *As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.* (Emphasis added.)

Therefore, where a criminal act is done by several persons in furtherance of a common intention, each of such persons is liable for the criminal act as if it were done by him alone. Common intention is usually inferred, since direct evidence is almost an impossibility, from act and conduct *acta exteriora indicant interiora secreta* if the inference is a necessary inference deducible from the circumstances of the case, but not, as was suggested by the trial court, by evidence of an identical act or deed.

In the trial below, there was ample direct evidence that both respondent had assaulted the deceased. The eyewitnesses testified that the respondents had repeatedly struck the deceased; the first respondent with a wooden stool and the second respondent with a stick. Although the second respondent claimed that he was the middleman, the first respondent's testimony was that the second respondent had passed him a stick. There was active participation by both respondents in the same criminal act that brought about the deceased's death. Indeed, the direct evidence against each respondent was so overwhelming that there was no need whatsoever to rely on s 34.

The appeal is allowed; and the trial court's acquittal is reversed by a conviction of the respondents of an offence punishable under s 304 of the Code.

As for the sentence taking into account public interest, the seriousness of the offence and the mitigation, each respondent is sentenced to 12 years' imprisonment.

Appeal allowed.

Reported by Mariette Peters-Goh